(7)

No. 01-175

IN THE

Supreme Court of the United States

SPENCER WILLIAMS, LOUIS C. BECHTLE,
SANDRA S. BECKWITH, WILLIAM MATTHEW BYRNE, JR.,
ADRIAN G. DUPLANTIER, MORRIS E. LASKER,
THOMAS COLLIER PLATT, JR., JOHN W. REYNOLDS,
WALTER HERBERT RICE, MARVIN H. SHOOB,
JOSEPH L. TAURO, LAUGHLIN E. WATERS,
LEE R. WEST AND HENRY RUPERT WILHOIT, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties.[1]

INTEREST OF THE AMICUS CURIAE

The American College of Trial Lawyers (the "College") has for more than fifty years sought to improve and enhance the standards of trial practice, the administration of justice, and the ethics of the profession. Membership in the College is by invitation. The College strives to induct as Fellows lawyers from the top rank of the trial bar in the United States and Canada. The College limits membership to one percent of the number of persons admitted to practice in any particular state or province. To qualify as a Fellow, a lawyer must have at least fifteen years of trial experience.

The College first approved a Code of Trial Conduct in 1956, which has been revised and updated periodically. One of the fundamental tenets of the Code is a commitment by the Fellows of the College to be vigilant in the maintenance of the dignity and independence of the judiciary. The College's commitment to judicial independence has been demonstrated in the past by providing funding for a Report to the 1986 Interim Commission on Executive, Legislative and Judicial Salaries, entitled *Promises Made, Promises Still Unkept: Restoration of Inflation-Induced Salary Cuts for Top Government Officials* (October 1, 1986).

The decision below strikes at the heart of our nation's ability to be guaranteed an independent judiciary, free of legislative turmoil and coercion. The threat to the nation's quality of justice is significant, and the diminution of salary which has occurred cannot be countenanced. The College files this brief *amicus curiae* to present the broad policy considerations with which it is particularly

1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Supreme Court of the United States, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* and its counsel.

concerned and its view concerning the negative impact of the decision by the Court of Appeals.

REASON FOR GRANTING THE WRIT

The so-called "blocking statutes"[2] challenged by Petitioners raise a serious concern under the Compensation Clause meriting this Court's attention because the blocking statutes had the effect of reducing the salaries of federal judges below levels approved by law, while the salaries of the vast majority of federal employees were not similarly reduced. As is explained in more detail in the Petition for Writ of Certiorari, Congress provided in the Ethics Reform Act of 1989[3] that federal judges would receive cost of living adjustments ("COLAs") in any year in which the salaries of General Schedule employees were adjusted under the Federal Pay Comparability Act. In fiscal years 1995, 1996, 1997, and 1999, the overwhelming majority of federal employees received COLAs because the salaries of General Schedule employees were adjusted. Congress blocked federal judges from receiving the COLAs authorized by law by adopting resolutions, which the President signed — the blocking statutes. In light of the historical importance of the Compensation Clause in protecting the independence of the judiciary and this Court's decision in *Hatter v. United States*, 121 S. Ct. 1782 (2001), blocking the judiciary from obtaining a salary adjustment received by almost every other federal employee discriminates against the judiciary in violation of Article III. This Court should grant the writ to consider the important constitutional issues raised by the blocking statutes.

2. The "blocking statutes" are those statutes by which Congress prevented from going into effect the cost of living adjustments which otherwise would have automatically increased the base pay of the judiciary. *See* Appendix to the Petition for Writ of Certiorari at 4.

3. Pub. L. No. 101-194, 103 Stat. 1716 (1989).

I. CONGRESS AND THE COURT BELOW STRAYED FAR FROM THE COMPENSATION CLAUSE'S HISTORICAL PURPOSES OF MAINTAINING AN INDEPENDENT JUDICIARY AND ENSURING SEPARATION OF POWERS AMONG THE BRANCHES OF GOVERNMENT, AND THIS COURT SHOULD GRANT REVIEW TO REINFORCE THE HISTORICAL INDEPENDENCE OF THE JUDICIARY.

The Compensation Clause seeks to maintain the independence of the judiciary and is a critical element of the Constitution's system of checks and balances.[4] Judicial autonomy is crucial to the proper functioning of the Constitution's allocation of powers because impartial and independent judges are required to determine whether the government's assertion of power against a citizen is consistent with the Constitution. As Alexander Hamilton observed, "the judiciary is beyond comparison the weakest of the three departments of power,"[5] and thus special vigilance is needed to prevent even the slightest erosion of the separation between the judiciary and the other branches of the government. By allowing Congress to reduce judicial pay below levels that previously had been enacted into law, the Federal Circuit's decision has significantly weakened the structural protection that the Compensation Clause gives to the independence of the judiciary. A brief review of the historical origins of the Compensation Clause demonstrates the error below and why this case involves important issues that deserve resolution by this Court.

Separating judges from the political branches of government is a longstanding tradition of the Anglo-American system of law. Structural protections for the independence of the judiciary were enacted as a correction to the abuses of the Stuart kings of England, who had freely removed judges who issued opinions with which the

4. Article III, Section 1 provides in relevant part: "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

5. *The Federalist* No. 78, at 437 (Alexander Hamilton) (Isaac Krammick ed., 1987).

monarch disagreed.[6] As part of the Settlement Act of 1701, which established the succession to the English throne after the death of Princess Anne, it was provided that "judges commissions be made *quamdiu se bene gesserint* [during good behavior], and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them. . . ." 12 & 13 Will. III, ch. 2, § III, cl. 7 (1701). This language was the direct source for Article III's command that judges "shall hold their Offices during good Behaviour." U.S. Const. art. III, § 1. In 1760, Parliament passed another act to strengthen the independence of the bench by providing that a judge's salary would not be decreased "so long as the Patents and Commissions of them, or any of them respectively, shall continue and remain in force." 1 Geo. III, ch. 23, § 111 (1760). Blackstone praised judicial independence as "preservative of the public liberty" and commented that liberty cannot "subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power." William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* 1:259-60 (1979).

While originally these protections of judicial salary and tenure applied to colonial judges, in 1761 "the King converted the tenure of colonial judges to service at his pleasure." *United States v. Will*, 449 U.S. 200, 219 (1980). Subjecting colonial judges to the whims and caprices of the King was one of the royal abuses cited in the Declaration of Independence, which denounced the King for making "[j]udges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence paras. 10 & 11 (U.S. 1776).

When the delegates to the Constitutional Convention met in 1787 to frame a new charter for the national government, they drew upon more than their colonial experiences. In the decade after the

6. The first two Stuart kings, James I and Charles I, dismissed Chief Justices Coke and Crew, respectively, when they tried to limit the royal prerogative in their decisions and assert the autonomy of the courts and the supremacy of the common law. *Atkins v. United States*, 556 F.2d 1028, 1048 (Ct. Cl. 1977) (*citing* J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* 40, 60 (1971)).

Revolution, according to one commentator, "the judiciary in many states was made subservient to the state legislature. . . . Judicial appointments and terms of service were controlled by legislatures, as were salaries and fees. State legislatures regularly overturned judicial findings and often took over traditional judicial duties such as rulings on probate, debt and even marriage and divorce." Isaac Krammick, Introduction, *The Federalist Papers* 22 (Isaac Krammick ed., 1987). The post-Revolutionary decade convinced the founders that a strong national government and an independent judiciary were necessary to preserve the Union. As one prominent scholar has written:

> It took a decade of experience under the state constitutions to expose the triple danger that so alarmed Madison in 1787: first, that abuse of the legislative power was more ominous than arbitrary acts of the executive; second, that the true problem of rights was less to protect the ruled from their rulers than to defend minorities and individuals against factious popular majorities acting through government; and third, that agencies of central government were less dangerous than state and local despotisms.

Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 290 (1996). Judicial independence was one of the crucial checks upon legislative power that would be vital to the new national framework.

To protect the judiciary from encroachments from the other two branches of government, the Convention went even further than the British system. The delegates rejected a proposal by John Dickinson of Pennsylvania to allow the removal of judges by a joint address of Congress.[7] James Wilson, one of the principal drafters of Article III, who opposed the proposal, stated:

> Such a provision in the British government is less dangerous than here, the House of Lords and House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had succes-

7. Todd Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 Wis. L. Rev. 993, 1020 (1998).

> sively offended by his independent conduct both houses of parliament. Had this happened at the same time, he would have been ousted. The judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our government.[8]

Thus, the founders inserted two clauses into the Constitution to protect the judiciary's autonomy: a clause providing that judges "shall hold their Offices during good Behaviour," and a clause requiring that judges shall "receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. As this Court explained, after reviewing the history leading up to the adoption of these clauses: "[i]n framing the Constitution, therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support." *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933).

The importance of judicial independence, and the function of these clauses in maintaining judicial independence, was explained after the convention by Alexander Hamilton in the Federalist Papers. First, the judiciary, because of its relative lack of power, was the branch in most danger of being co-opted by one of the other branches of government. As Hamilton observed, the judiciary, because it has "no influence over either the sword or the purse," has "neither FORCE nor WILL but merely judgement." *The Federalist* No. 78, at 437 (Alexander Hamilton)(Isaac Krammick ed., 1987). Because the judiciary would be "in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches," all possible care was necessary to protect its independence. *Id.* at 438.

Second, judicial autonomy is particularly important because judges have the power to declare laws unconstitutional. Hamilton pointed out that the Constitution is a "limited Constitution," by

8. *The Constitutional Convention and the Formation of the Union* 336-337 (Winton U. Solberg ed., 2d ed. 1990) (quoting Madison's Constitutional Convention notes).

which he meant that it placed certain restrictions on Congress's powers. "Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 438. Striking down the acts of another branch of government by the branch that already is the weakest would be, as Hamilton said, an "arduous" duty, and so preserving the "independent spirit" of judges would be necessary. *Id.* at 440.

Third, an independent judiciary is necessary to protect minorities from the "unjust and partial" actions of the majority. The framers of the Constitution were particularly concerned with the excesses of the post-Revolutionary state legislatures, and they considered an independent judiciary essential in preventing majorities from trampling on the rights of unpopular individuals. Judges would need to be safe from the retaliation or control of the other branches of government if they were to have the fortitude to take unpopular but correct actions, such as declaring laws unconstitutional or upholding the rights of minorities. "The benefits of the integrity and moderation of the judiciary have already been felt in more States than one. . . . Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today." *Id.* at 441.

Finally, and perhaps most importantly in this case, Hamilton noted that judicial independence would be necessary to assemble a qualified and skilled bench. Hamilton's prophetic observation about the difficulty of attracting able judges is worth repeating:

> It has been frequently remarked . . . that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and

> laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. . . . [A] temporary duration in office which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity.

Id. at 441-42.

Hamilton believed that the Compensation Clause played a crucial part in ensuring the independence of the judiciary. As he stated emphatically, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . *[A] power over a man's subsistence amounts to a power over his will.*" *The Federalist* No. 79, at 442-43 (Alexander Hamilton)(Isaac Krammick ed., 1987) (emphasis in original).

Hamilton was not alone in stressing the importance of judicial independence and the Compensation Clause, as this Court explained in *Evans v. Gore*, 253 U.S. 245 (1920). Other contemporaries also commented upon the importance of protecting judicial salaries from being reduced. Judge Story, for instance, stated that judicial independence would be a "mere mockery" without the protection of the Compensation Clause, and Chancellor Kent observed that it is necessary to induce lawyers "to quit the lucrative pursuits of private business" to become judges. *Id.* at 253.

These early commentators also emphasized more generally the importance of keeping the judiciary out of the political arena. James Wilson noted that if judges were not independent from the political branches, justice would suffer:

> But how can society be maintained — how can a state expect to enjoy peace and order, unless the administration of justice is able and impartial? Can such an administration be expected, unless the judges can maintain dignified and independent characters? Can dignity and independence be expected from judges, who

> are liable to be tossed about by every veering gale of politicks, and who can be secured from destruction, only by dexterously swimming along with every successive tide of party?

Wilson, 1 *The Works of James Wilson* 296-97 (Robert Green McCloskey, ed., Belknap Press, 1967). Chief Justice Marshall stated that "the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary." Proceedings and Debates of the Virginia State Convention of 1829-1830, pp. 616, 619 (1830).

Subsequent history has shown the importance of preserving the independence of the judicial branch. For example, in 1805, Supreme Court Justice Samuel Chase was impeached by the House of Representatives both for his political views and because of his demeanor as a judge. Although most observers agreed that Justice Chase was overbearing and arrogant, it is doubtful that he was actually guilty of "high crimes and misdemeanors," and his acquittal helped safeguard the future independence of the Court by setting a precedent that judges would not be removed solely because of their political views.[9] In the next two centuries, there have been repeated, albeit unsuccessful, assaults on the independence of the judiciary, from President Roosevelt's attempt to "pack" the Supreme Court in the 1930's to laws tha. encroach upon the authority of this Court. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). These experiences confirm the vital importance of judicial independence to the American system of government.

Today, those attacks continue, demonstrating once again the wisdom of the Founding Fathers in seeking to assure judicial independence. The importance of lifetime tenure of federal judges in preserving a judiciary that will protect the individual in the face of contrary popular opinion has been repeatedly underscored when unpopular judicial decisions give rise to attacks in the Congress and the media on the judges who authored them.[10] More relevant to the

9. *See generally* William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1999).

10. *See* Louis H. Pollak, *Criticizing Judges*, 79 Judicature 299 (1996); *see also* Kerry Hill, *Judges Under Fire at* http://www.ajs.org/cji/fire.html (last visited August 16, 2001).

current case, at a time when federal judicial salaries suffer by comparison to the salaries paid by some law firms to recent law school graduates, the statutes challenged by Petitioners, and the decision below enforcing those statutes, have resulted in a real decline in the compensation received by federal judges. As demonstrated by the Brief of American Bar Association as Amicus Curiae Supporting Petitioners, these economic realities have created an environment in which persons who care about the administration of justice, such as the members of the College, have cause to share the Founding Fathers' concern about the magnetic effect of a "lucrative line of practice" in discouraging qualified lawyers from accepting appointment to, or remaining on, the federal bench. Accordingly, this case involves an important issue concerning whether Congress through the blocking statutes has violated the Compensation Clause, and this Court should grant certiorari to address it.

II. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRECEDENTS INTERPRETING THE COMPENSATION CLAUSE TO PROHIBIT CONGRESS FROM PASSING LAWS THAT HAVE A DISCRIMINATORY EFFECT ON THE COMPENSATION OF THE JUDICIARY.

Review is also warranted to address the inconsistency between the decision below and this Court's decisions, most recently in *Hatter v. United States*, 121 S. Ct. 1782 (2001), holding that laws with a discriminatory effect on judicial compensation violate the Compensation Clause. The blocking statutes, which had the effect of reducing authorized judicial compensation while the compensation of virtually all other federal employees was not reduced, effect the kind of discrimination barred by the Compensation Clause and *Hatter*. This discrimination should be addressed and remedied to safeguard the independence of the judiciary.

As Chief Judge Mayer stated below, to maintain judicial independence and attract well-qualified people to the bench, this Court "has broadly interpreted the Compensation Clause to protect against the remotest influence, direct or indirect, by the other branches of government." (Appendix to the Petition for Writ of

Certiorari at 152 (Mayer, C.J., dissenting from the order declining hearing en banc)). Although the Compensation Clause's prohibition against diminishing judicial compensation is so clear and absolute that it was rarely at issue in the nineteenth century, the increasingly complex federal laws affecting judicial compensation in the twentieth century have raised questions under the Compensation Clause necessitating resolution. Most of the Court's Compensation Clause decisions have involved laws of general application that directly or indirectly reduced federal judges' compensation. The Court has held that judges are not immune from federal laws of general application that have the indirect effect of reducing their compensation, but that Congress may not pass laws that discriminate against the judiciary in comparison to the citizenry at large or other federal employees.

The principle that Congress may not discriminate against the judiciary in matters affecting compensation first arose in a tax case. In *Evans v. Gore*, 253 U.S. 245 (1920), a federal judge challenged the application of a federal income tax enacted after the judge joined the bench. The Court reviewed the history of the Compensation Clause and found that the primary purpose of the Clause was "to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution. . . ." *Id.* at 253. The Court held that the tax was an unconstitutional diminution of the judge's salary. *Id.* at 263-64. Dissenting Justice Holmes, joined by Justice Brandeis, acknowledged the importance of protecting the salaries of judges from diminution "to secure the independence of judges." *Id.* at 265 (Holmes, J., dissenting). He concluded, nonetheless, that the Compensation Clause provided "no reason for exonerating [a judge] from the ordinary duties of a citizen." *Id.* The Court subsequently extended the holding of *Evans* to all federal taxes, whether enacted before or after a judge was appointed, in *Miles v. Graham*, 268 U.S. 501 (1925).

Miles was roundly criticized, and the Court subsequently overruled it in *O'Malley v. Woodrough*, 307 U.S. 277 (1939), which held that a non-discriminatory federal income tax of general application does not violate the Compensation Clause. The Court

explained that "[t]o subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Id.* at 282. Implicit in the reasoning of *O'Malley* is that a law of general application is constitutional, but a discriminatory law — one whose indirect reduction of judicial pay did not apply generally — violates the Compensation Clause.

Last Term, this Court expanded upon the reasoning of *O'Malley* in *Hatter v. United States*, 121 S. Ct. 1782 (2001), and held that "the [Compensation] Clause does not prevent Congress from imposing a 'nondiscriminatory tax laid generally' upon judges and other citizens, but it does prohibit taxation that singles out judges for specially unfavorable treatment." *Id.* at 1787 (citation omitted). *Hatter* concerned the 1983 extension of Medicare and Social Security taxes to federal employees, including judges. The Court first overruled *Evans* but reaffirmed its explanation of the importance of the Compensation Clause in maintaining judicial independence. The Court stressed that the Clause helps "to secure an independence of mind and spirit necessary if judges are 'to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.'" *Id.* at 1791 (quoting W. Wilson, *Constitutional Government in the United States* 143 (1911)). The Court disagreed with *Evans* only in its application of the Clause to "a nondiscriminatory tax that treated judges the same way it treated other citizens." *Id.* at 1792. The Court quoted with approval the dissent of Justice Holmes, which reasoned: "'[t]o require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge.'" *Id.* (quoting *Evans*, 253 U.S. at 265 (Holmes, J., dissenting)). The Court therefore concluded that subjecting judges, like all other federal employees, to Medicare taxes was not discriminatory and thus was constitutional. *Id.* at 1792-93.

The Court came to the opposite conclusion regarding the extension of Social Security taxes to federal judges. The 1983 law made it voluntary for most current federal employees to participate

in the Social Security system, but required certain high level federal employees, including federal judges, to pay Social Security taxes. *Id.* at 1787-88. The new law, however, created an exception to the exception by allowing any high-level employee who participated in a contributory retirement program to modify his or her participation in a manner that left the employee's total payroll deduction — for retirement and Social Security — unchanged. *Id.* Those who did not participate in such a contributory retirement program, however, had Social Security taxes deducted from their paychecks — and practically the only persons in this last category were federal judges. *Id.* at 1789.

After reviewing these features of the law, the Court found that the law discriminated against judges and thus violated the Compensation Clause. The Court gave several reasons for its conclusion. First, because federal employees — including judges — had remained outside the Social Security system for nearly fifty years, federal employees, rather than the public at large, were the proper class against which to measure when determining whether the law discriminated against judges. *Id.* at 1793. Second, the law applied a new financial burden upon sitting judges but, as a practical matter, did not impose that burden upon any other federal employees. *Id.* Third, the Court held that the Government's justification for the statutory distinction between judges and other federal employees was "unsound." *Id.* The Court noted that the judicial retirement system is noncontributory (that is, judges are not required to contribute any portion of their salary towards it) because judges, due to their life tenure, may continue to draw their salary for life; thus a contributory system would not work. The fact that judge's pensions were not contributory could not justify the unequal treatment because the Compensation Clause does not allow "taxes which have the effect of weakening or eliminating those constitutional guarantees necessary to secure judicial independence, at least insofar as similar guarantees are not enjoyed by others." *Id.* at 1794. These factors led the Court to conclude that "the 1983 Social Security tax law discriminates against the Judicial Branch, in violation of the Compensation Clause." *Id.* at 1795.

The Court also rejected two other justifications offered by the Government for the unequal treatment afforded by the Social

Security law. First, the Court rejected the argument that proof of discriminatory intent was required to establish a Compensation Clause violation:

> The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this Court has never insisted upon such evidence. To require it is to invite legislative efforts that embody, but lack evidence of, some such intent, engendering suspicion among the branches and consequently undermining that mutual respect that the Constitution demands. . . . Nothing in the record discloses anything other than benign congressional motives. If the Compensation Clause is to offer meaningful protection, however, we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the Judiciary.

Id. at 1795-96 (citation omitted). Second, the Court rejected the claim that the law was not discriminatory in violation of the Compensation Clause simply because it also disfavored the President and potentially certain Legislative Branch employees. *Id.* at 1796. Under *Hatter*, a law that treats the compensation of the judiciary unfavorably when compared to the vast majority of other federal employees is forbidden by Article III.

Although *Hatter* concerns the taxation of judicial salaries, the logic of its holding applies with even more force to Congress's treatment of more directly affected judicial compensation. *See Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977) (analyzing whether law directly affecting judicial compensation was discriminatory in violation of the Compensation Clause). In *Hatter*, the Court stated that "[w]ere the Compensation Clause to permit Congress to enact a discriminatory law . . . it would authorize the Legislature to diminish, or to equalize away, those very characteristics of the Judicial Branch that Article III guarantees — characteristics which, as we have said, the public needs to secure that judicial independence upon which its rights depend." *Hatter*, 121 S. Ct. at 1795. The clear import of *Hatter* and this Court's Compensation Clause jurisprudence is that the Clause bars any direct or indirect reduction in judicial compensation, with the only

exception being made for a law, such as the federal income tax, that applies to all citizens. If a law indirectly reduces the compensation of judges and does not have the same effect on a larger group, then the law is discriminatory and in violation of the Compensation Clause.

The blocking statutes raise the same Compensation Clause problem posed by the Social Security tax at issue in *Hatter*. Both single out the judiciary for unfavorable treatment. Both have the effect of reducing the salaries of federal judges, along with a small handful of other employees, whereas the vast majority of federal employees did not have their salaries reduced. Both adversely affected the federal judiciary. Although in neither *Hatter* nor this case is there proof that Congress actually had discriminatory animus, such proof is not necessary. *Hatter*, 121 S. Ct. at 1795-96.[11] The numerous similarities between the laws at issue here and the Social Security tax at issue in *Hatter*, a case not decided until after the decision of the panel below,[12] demonstrates that this case merits review by this Court.

The fact that the blocking statutes also applied to Congress and a few high level executive employees does not render them permissible under the Compensation Clause, for several reasons. First, taxes and other laws that reduce compensation are permissible under the Clause only if they are laws of *general* application that impose upon judges the same burdens imposed upon other citizens. The blocking statutes are not such laws because they apply to only a few officials and do not disadvantage the general population of federal employees. In effect, the blocking statutes impose the burden of not receiving a cost of living adjustment on judges, along with a few others, but do not impose that same burden on the vast majority of federal employees.

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11. This Court's decision in *United States v. Will*, 449 U.S. 200 (1980), does not answer the Compensation Clause problem posed by the blocking statutes for two primary reasons. First, the *Will* Court did not consider whether the statutes at issue discriminated against the judiciary. Second, as is explained in the Petition for Writ of Certiorari, there are significant differences between the statutes at issue in *Will* and the blocking statutes.

12. After *Hatter* was decided, the judges below submitted a second petition for rehearing to the court en banc, but the court denied the petition. *See* Appendix to the Petition for Writ of Certiorari at 167-68.

Second, the Court found in *Hatter* that the application of Social Security taxes to judges was discriminatory even though the President and potentially certain legislative employees were also affected. The Court found that the inclusion of a few other employees did not make a "critical difference." Similarly, the mere inclusion within the blocking statutes of Congressional pay raises, which are fraught with the politics from which the judiciary should be separated, does not justify treating the federal judiciary differently.

Third, there is a crucial difference between the judiciary on the one hand, and Congress and high-level executive employees on the other. Members of Congress and senior executive employees both belong to the two political branches of government. Both branches have control over their salaries, since federal salaries must be approved by Congress and are subject to the executive veto.[13] By contrast, the judiciary is not a political branch and holds no power to affect its salary in any way. The linkage between Congressional and judicial pay has no justification other than convenience and political expediency, and convenience cannot validate the discrimination that this linkage perpetuates.

Finally, far from assuaging Compensation Clause concerns, the linkage of Congressional and judicial pay causes the kinds of concerns about judicial independence that the Compensation Clause is designed to prevent. Again, these concerns were best expressed by James Wilson, who warned that judges could not be independent if they were "liable to be tossed about by every veering gale of politicks,"[14] and that "[t]he judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our government."[15] The Compensation Clause was designed to secure the independence of the judiciary, to the extent possible, by separating the judiciary from the other two branches.

13. The President, of course, is an exception, as his salary may be neither increased nor decreased during his term of office. U.S. Const. art. II, § 2, cl. 7.

14. Wilson, 1 *The Works of James Wilson* 296-97 (Robert Green McCloskey, ed., Belknap Press, 1967).

15. *The Constitutional Convention and the Formation of the Union* 336-337 (Winton U. Solberg ed., 2d ed. 1990) (quoting Madison's Constitutional Convention notes).

Linking Congressional and judicial pay, along with executive pay, makes judges dependent upon Congress; far from being separated, the branches are quite explicitly joined together in the blocking statutes. It would turn the doctrine of separation of powers on its head if a law that stitched together the fates of the three branches, reducing the chance that any branch would hold it unconstitutional, saved the law from being found to violate the independence of the judiciary.

This Court has scrupulously guarded against even indirect effects on judicial compensation because of the importance of safeguarding judicial independence. Even the faintest perception that Congress could influence federal judges by reducing their compensation, directly or indirectly, would undermine the legitimacy of federal judicial decisionmaking. As this Court stated in *Hatter* in explaining why discriminatory laws violate the Compensation Clause even without evidence of an intent to influence or intimidate, "judges 'should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by anything, except their own behavior and its consequences.'" *Hatter*, 121 S. Ct. at 1795 (quoting Wilson, 1 *Works of James Wilson* at 364 (Robert Green McCloskey, ed., Belknap Press, 1967)). The decision of the court below failed to apply this level of vigilance in considering the effects of the blocking statutes. Indeed, perhaps because the lower court returned its decision before *Hatter*, the court failed to recognize the discriminatory impact of the blocking statutes. Because of the inconsistency between the analysis in *Hatter* and the decision below, this Court should grant review.

CONCLUSION

Congress may decide for political reasons not to increase its own pay. Political appointees also tend to serve for limited periods. A judge, however, is appointed for life and has, in all probability, taken a pay cut to perform a critical public service that is vital to the sound administration of justice. The Framers of the Constitution recognized that an independent judiciary, whose compensation could not be diminished, was essential to the effective separation of powers at the heart of civil liberties in this country, and the Compensation Clause guarantees the judiciary that independence. Congress has unconstitutionally diminished judicial salaries by passing the blocking statutes at issue in this case, and this Court must hear the matter to reestablish the constitutional guarantee of judicial independence and an undiminished compensation.

Respectfully submitted,

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Dated: September 28, 2001

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